

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| DONALD R. HULL | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| JEROME MALLON, WENTWORTH D. | : | |
| VEDDER, CHRISTOPHER DIVINY, | : | |
| Assistant Philadelphia District | : | |
| Attorney, and LYNN ABRAHAM, | : | |
| Philadelphia District Attorney | : | No. 00-5698 |

MEMORANDUM ORDER

Plaintiff initiated this action in the Philadelphia Common Pleas Court. He asserts that defendants engaged in professional malpractice and violated his 6th and 14th Amendment rights. The case was timely removed to this court by defendants Abraham, Diviny and Vedder, the only defendants to have been served.¹

Presently before the court is defendant Vedder's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6). Dismissal for failure to state a claim is appropriate when it clearly appears that the plaintiff can prove no set of facts to support the claim which would entitle him or her to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). A

¹Although plaintiff makes no reference to 42 U.S.C. § 1983, he does allege constitutional violations in a context sufficient to support original subject matter jurisdiction.

complaint may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).²

The following appears from plaintiff's complaint and attachments. Plaintiff was charged with aggravated assault and involuntary deviate sexual intercourse arising from his brutal encounter on August 13, 1993 with Rhonda Taylor. She was choked, sodomized, beaten, left in Fairmount Park where she was found by police and admitted to a hospital in critical condition. Plaintiff pled guilty to these charges on November 18, 1993 and received two eight-to-twenty year concurrent sentences. He was represented by Mr. Mallon, a public defender.

Plaintiff filed a pro se petition under the Pennsylvania Post-Conviction Relief Act in the summer of 1997. Ultimately, the court appointed defendant Vedder, a private defense attorney, to represent plaintiff. Mr. Vedder filed a Finley no-merit letter with the court on April 6, 2000.³

Plaintiff alleges that Mr. Vedder committed

²While well pled factual allegations are accepted as true, a court need not credit bald conclusory assertions or legal conclusions. See Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). A court may also consider public records and documents attached to the complaint, as well as documents of undisputed authenticity on which a claim is predicated that are appended to the motion. See Churchill v. Star Enter., Inc. v. Trump, 183 F.3d 184, 190 n.5 (3d Cir. 1999); Beverly Enter., Inc. v. Trump, 182 F.3d 183, 190 n.3 (3d Cir. 1999), cert. denied, 120 S. Ct. 795 (2000).

³See Com. v. Finley, 550 A.2d 213 (Pa. 1988).

"professional negligence and malpractice" when he failed to conduct an adequate investigation of plaintiff's claim of innocence before filing the Finley letter in disregard of his obligations under the Pennsylvania Rules of Professional Conduct. He alleges that he was denied a "fair trial" and "due process" when Mr. Vedder misrepresented facts and law to the court in a hearing on June 19, 2000, after the filing of the no-merit letter without adequately investigating his claim of innocence.

A court-appointed defense attorney is not a state actor and his conduct is not state action for purposes of § 1983. See Polk County v. Dodson, 454 U.S. 312, 325 (1981); Sceifers v. Trigg, 46 F.3d 701, 704 (7th Cir. 1995); Borsello v. Leach, 737 F. Supp. 25, 26 (E.D. Pa. 1990); Rankine v. Server, 2001 WL 322517, *1 (E.D. Pa. Feb. 13, 2001). Thus, however deficient counsel's representation of plaintiff on his PCRA petition may have been, it would not constitute a constitutional violation.

Plaintiff has alleged no specific facts from which it would appear that counsel was professionally deficient, let alone that plaintiff would have obtained post-conviction relief but for such deficiency. To sustain a malpractice claim against his trial counsel, a criminal defendant must first secure post-conviction relief and demonstrate his actual innocence. See Bailey v. Tucker, 621 A.2d 108, 114-15 (Pa. 1993). The Bailey requirements have been applied to malpractice claims against PCRA and habeas counsel. See Williams v. Sturm, 110 F. Supp. 2d 353, 358-59 (E.D. Pa. 2000); Sample v. Dugan, 2000 WL 992521, *2

(E.D. Pa. July 19, 2000); Slaughter v. Rushing, 683 A.2d 1234, 1236 (Pa. Super. 1996).

ACCORDINGLY, this day of August, 2001, upon consideration of defendant Vedder's Motion to Dismiss (Doc. #9) and plaintiff's response, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and plaintiff's claims against defendant Vedder are **DISMISSED**.

BY THE COURT:

JAY C. WALDMAN, J.